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The Young Victim as Witness for the Prosecution: Another Form of Abuse?

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I. Introduction

> annie died the other day
> never was there such a lay —
> whom, among her dollies, dad
> first ("don't tell you mother") had;
> making annie slightly mad
> but very wonderful in bed
> — saint and satyrs, go your way
> youths and maidens: let us pray.[1]

The existence of brutal sexual misuse of children cannot be doubted.[2] Stories emanating from Pennsylvania alone chronical a tragic history of children abused and their abusers left unpunished. For example, in Dauphin County, Pennsylvania, doctors discovered a three-year old boy afflicted with gonorrhea of the mouth, penis, and rectum. The child, too terrified to speak, could not provide competent testimony at trial, forcing the prosecution to drop the case.[3]

Similarly, in Harrisburg, Pennsylvania, an external medical examination of an eight-year old child revealed a red rash along the inner surface of her thighs and a yellow-greenish discharge from her vagina. Test results indicated gonorrhea. Eleven days later, when the excruciating pain had sufficiently subsided to permit an internal examination, doctors noted an absence of the hymen and an abnormally large vaginal opening. The child had been raped twice, by a neighbor who cared for her on a routine basis.[4] Likewise, in Philadelphia, Pennsylvania, a two-year old infant was snatched from her crib and raped. Subsequently, her throat was slit and she was left in an alley to die.[5] Finally, in Cumberland County, Pennsylvania, three

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1. E.E. CUMMINGS, COLLECTED POEMS 45 (1963).
2. *See infra* notes 3-13 and accompanying text. Sexual misuse of a child has been defined as the exposure of a child to sexual stimulation inappropriate for the child's age, level of psychosocial development, and role in the family. Brant & Tisza, *The Sexually Misused Child*, AM. J. ORTHOPSYCHIATRY 80, 81 (Jan. 1977).
3. Interview with official from Dauphin County Deputy District Attorney (Sept. 24, 1984).
4. *Id.*
5. Philadelphia Inquirer, Aug. 16, 1984, at B8, col. 3.

brothers, all under the age of six, were sexually assaulted by their father. The court held the brothers incompetent to testify in a criminal proceeding because of their immaturity. Consequently, the children remain in their father's custody and care.[6]

Unfortunately, the outrage of child sexual abuse in Pennsylvania is far from unique. The problem confronts every community, city, and state in the nation. No economic class, race or nationality is immune.[7] The presumption of moral integrity traditionally afforded certain institutions — such as church groups, nursery schools, and scouting organizations — has been severely weakened in the face of recurrent child abuse in their midst. Sexual child abuse occurs within the family. It occurs within schools,[8] churches,[9] foster homes,[10] youth organizations,[11] military academies,[12] and day care centers.[13]

Sensational disclosures of horrid details of sexual abuse of children, as well as the growing conviction that children possess enforceable legal rights, have hurled sexual abuse of children into national prominence. Parents who must entrust their children to others during work hours demand measures to eliminate the problem, but find

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6. Interview with official of Cumberland County Children and Youth Services (Sept. 10, 1984).

7. U.S. DEPT. HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT 7-8 (1974-1975).

8. A popular teacher at Glenbrook North High School, was arrested on charges of kidnapping, murder, and deviate sexual assault. He was accused of abducting a 17-year old boy and binding, gagging, and sexually assaulting him before the boy died. C. LINDECKER, CHILDREN IN CHAINS 104 (1981). In Daytona Beach, California, a former student gave police 37 typewritten pages of sworn testimony detailing orgies, beatings, and submission to anal intercourse with a school principle. *Id.* at 85.

9. In Alto, Tennessee, an Episcopalian priest established and maintained a home for boys. Investigators uncovered more than 1,000 photographs of nude boys and adults engaging in homosexual acts. The priest, as well as adult patrons of the home, appeared in some of the photographs. The patrons were identified and traced to 12 states. *Id.* at 54.

10. Scotty Baker had been placed in foster homes in Dade County, Florida. Regular sexual assaults by his various foster fathers — initially forced upon him — became a way of life. When Scotty became a key witness in police attempts to uncover sex crimes against children, results of the years of trauma emerged. Scotty stripped the insulation from an extension cord, taped the wire to his chest, and plugged it into the wall socket. *Id.* at 81.

11. In Illinois, a boy scoutmaster and his assistant were arrested and charged with taking indecent liberties with an 11-year old boy while on a camping trip. In Massachusetts, two scout leaders were charged with rape and other sex offenses against boys ranging from 11 to 14 years. *Id.* at 84-85.

12. In October, 1984, the "granite ramparts of the United States Military Academy [at West Point], the nation's oldest military post and the villages in its shadow have been rocked by charges that children were sexually and physically abused at a day care center on its grounds." When their three-year old daughter began to scream when she tried to urinate, an enlisted man and his wife rushed her to the hospital, where she was treated for vaginal bleeding. The child indicated that her teacher had inserted a pen into her vagina. Philadelphia Inquirer, Oct. 18, 1984, at A2, col. 1.

13. Authorities charge that for at least ten years, more than 100 children have been sexually victimized at a prestigious California preschool. The children were fondled, sodomized, and raped. Some may have participated in pornography and prostitution. *A Hidden Epidemic*, NEWSWEEK, May 14, 1984, at 33.

no quick solutions forthcoming. Sexual abuse of children presents formidable and complex issues. One particularly troublesome area concerns the child's role, not only as a victim, but also as the prosecution's witness at trial.

This comment discusses difficulties encountered when a trial witness is a sexually victimized child.[14] It examines proposed Pennsylvania legislation intended to remedy disparate treatment of children within the judicial system. Finally, it addresses remaining questions and recommends future action.

II. Background

When children appear in court as witnesses, attorneys and judges confront the same problem—is the child competent to testify? Only when the court resolves this question affirmatively may the witness take the stand. The standards by which judges determine competency, however, vary among jurisdictions.

In Pennsylvania, the law presumes that every witness is competent to testify in criminal proceedings.[15] While under Pennsylvania law no particular age dispositively indicates incapacity to testify,[16] opposing counsel may attack the child witness' competency through trial objections. The objecting party carries the burden of proving incompetency.[17] However, courts have not dogmatically enforced the statutory presumption of competency. In practice, when the witness is less than fourteen years old, the trial judge must conduct a thor-

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14. 42 PA. CONS. STAT. ANN. § 6302 (Purdon 1982) defines "child" as an individual who:

> (1) is under 18 years of age
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> (2) is under the age of 21 years who committed an act of delinquency before reaching 18 years
>
> (3) was adjudicated dependent before reaching 18 years and who, while engaged in a course of instruction or treatment, requests the court to retain jurisdiction until the course has been complete, but in no event . . . past the age of 21 years.

This Comment primarily addresses the legal problems that arise and possible remedies to those problems when the child witness is under 14 years of age. The Comment discusses these issues solely in the context of criminal court proceedings.

15. 42 PA. CONS. STAT. ANN. § 5911 (Purdon 1982). This statute provides in pertinent part that "all persons shall be fully competent to testify in a criminal proceeding."

16. Rosche v. McCoy, 397 Pa. 615, 620-21, 156 A.2d 307, 310 (1959). In this automobile accident case, a seven-year old girl planned to testify about events she witnessed when she was four years old. The trial judge conducted an extensive inquiry and concluded that the witness was incompetent. He based his conclusion on the fact that her testimony required that the young witness understand the implications of what she observed at the time it occurred.

17. Commonwealth v. Short, 278 Pa. Super. 581, 586, 420 A.2d 694, 696 (1980). The defendant was charged with rape, deviate sexual intercourse, and aggravated assault. The nine-year old victim replied to questions about the nature of truth and the obligation of the oath with terse yes and no answers. Although she was unable to give an example of lying and was unfamiliar with the concept of divine retribution, the trial court qualified the child as a competent witness. In upholding the trial court's decision, the Pennsylvania Supreme Court noted that the child knew the meaning of truth and was cognizant of the possibility of punishment for telling falsehoods.

ough inquiry to establish the mental capacity of the witness.[18] In the seminal case of *Rosche v. McCoy*,[19] the Pennsylvania Supreme Court enunciated criteria for assessing a child's testimonial capacity. The court held that, first, the child must be able to observe and recall the occurrence about which he will testify; second, the child must be able to communicate, by both understanding the questions and framing intelligent answers; and, third, the child must be conscious of a duty to speak truthfully.[20]

The first requirement for establishing competency necessitates that the child possess adequate cognitive and memory[21] skills to comprehend and remember the occurrence without prompting. While the law assumes that a child's memory is inferior to an adult's and subject to greater distortion,[22] at least one commentator has sug-

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18. *Id.* at 586, 420 A.2d at 696-97. *See also* Commonwealth v. Fultz, ____ Pa. Super. ____, ____, 462 A.2d 1340, 1343 (1983).

19. Rosche v. McCoy, 397 Pa. 615, 156 A.2d 307 (1959).

20. *Id.* at 620-21, 156 A.2d at 310.

21. The human memory performs at least two functions: the storage of experience for a period of time and the retrieval of that information. Historically, psychologists contended that memory recorded all perceived events with equal strength. This meant that when a person could not remember something, the deficiency stemmed from his ability to recall, rather than from initially poor storage. However, current psychological theory maintains that memory involves two distinct and distinguishable processes: short term memory and long term memory. When a person perceives an event, short term memory renders the input information available for a maximum of 30 seconds. Special effort must be employed to transfer short term memory to long term memory. In the absence of such effort, the perception may be lost forever. The child's memory skills are often assessed by asking him to recall what he saw or heard or by asking him to recognize the source of his perception. To recall an event, the child is required to reclaim all essential information without prompting or assistance.

Recognition of an event is less demanding. In testing recognition, a child is presented with familiar and unfamiliar information. He must select only the familiar information. Both children and adults perform better when asked to recognize an event as compared to recalling it. The difference between recall and recognition memory, however, is more pronounced in young children than in older children. If a five-year old child is shown 12 pictures and asked to recall or recognize them, he will typically recall four but recognize all 12. His recall memory is much poorer than his recognition memory.

The child's recall memory is also weaker than that of an adolescent or adult. Because the young child does not possess an adequate set of cognitive units — such as images, symbols, concepts, and rules — with which to label information, he often is unable to name an event. Naming an event requires increased attention, which in turn facilitates the occurrence's storage in memory longer.

Additionally, a child does not spontaneously repeat events to himself in order to aid their storage; nor does he actively try to retain material. The child may still be uninterested in remembering the details of his life.

Different functions of memory also exist between adults and within individuals, depending on the circumstances under which the subject attempts to recall events. Memory, which continually reorganizes segments of knowledge into more meaningful systems, is the most elusive, yet one of the most central thought processes. Its capacity for storing information is undisputedly enormous, but it is fragile and vulnerable to even slight interferences, such as anxiety, distraction, and fatigue. Anxiety influences memory by interfering with focused attention, while motivation affects the quality of memory. DEVELOPMENTAL PSYCHOLOGY TODAY 264 (J. Aronfreed ed. 1974).

22. Cohen & Harnick, *The Susceptibility of the Child Witness to Suggestion*, 4 LAW & HUMAN BEHAVIOR 201, 201-02 (1980). This article discusses the reliability of child witnesses and concludes that because of their suggestibility, child witnesses should be treated with suspicion. The article reports the results of an experiment in which researchers compared 3rd

gested that a child's memory may not be any more problematic, when recollection is stimulated by direct questions.[23] Research data, however, on children's memory and recollection over long periods of time remains inconclusive.[24] Additionally, great stress may compromise a child's memory skills.[25] Even when the child's memory skills are adequately developed, his testimony may be of questionable value if his imagination blends fact and fantasy. The child must be able to organize his experience intellectually and distinguish it from thoughts and fantasies.[26] A young child may have difficulty, however, conceptualizing complicated events and ordering them in space and time.[27] This handicap may render the child ill-suited to present a cogent analysis of witnessed events.[28]

The second requirement for establishing competency relates to a child's basic intelligence and his use of language. Generally, a young child's verbal skills are not sufficiently developed to enable proficient articulation of his thoughts in adult terminology. Often the child does not understand meanings of words used by adults, and questions asked by counsel seem bewildering and senseless.[29]

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grade, 6th grade, and college students on their ability to recall events from a film. The recall ability was tested by asking the subjects leading and suggestive questions. The data indicated that the 6th graders performed as well as college students in memory capacity and ability to resist suggestions. Third graders were inferior in this area to 6th graders. However, even under confusing conditions, the 3rd grade children gave correct responses to 51% of the non-suggestive questions. This rose to 76% correct on non-suggestive questions after a second session. While the latter performance yielded statistics lower than the 87.5% correct scored by college students, it nevertheless indicates that the 3rd grade children retained correct information. Authors Cohen and Harnick contend that the onus rests upon legal machinery to adopt interrogation procedures, both inside the courtroom and outside, which will elicit this information with minimal distortion.

23. Melton, *Children's Competency to Testify*, 5 LAW & HUMAN BEHAVIOR 73 (1981).

24. *Id.* at 77.

25. *See, cf., Id.*

26. Stafford, *The Child As Witness*, 37 WASH. L. REV. 303, 304 (1972).

27. Melton, *supra* note 23, at 78. The author suggests, however, that a young child's difficulty in conceptualizing complex events may not be as significant as it first appears. Melton suggests that if jurors can ascertain facts from a child's subjective account, the significant of the child's immaturity diminishes. Additionally, a child's inability to fully comprehend a situation may not render him incapable of the level of observation required by law. *Id.* at 78.

28. *Id.* at 77. Piaget, an eminent Swiss psychologist who developed theories of cognitive development, observed three stages in the development of time concepts. In the first stage, four and five-year old children define time in terms of spatial stopping points of objects. The object that stops further ahead is perceived as having travelled faster, longer, and further. During the second stage, the child begins to consider other factors, such as starting points. The child's mastery of this concept is perfected in the third stage, generally at the age of seven or eight years.

29. Stafford, *supra* note 26, at 314. Under a normal pattern of vocalization development, an 18-month old child knows ten words and uses phrases composed of adjectives and nouns. At two years old, the child's vocabulary includes about 300 words. The child can use pronouns and name familiar objects. He can tell about his experiences. By the time the child reaches three years old, he has a vocabulary of 900 words, and talks in sentences. The child does not appear to care whether others listen. He uses plurals and defines objects in terms of their use. The vocabulary of a five-year old child includes approximately 2,100 words. He talks constantly and asks questions about the meanings of words. The six-year old has command of

The third requirement for establishing competency encompasses a child's sense of moral duty. The competency of the child witness is challenged most frequently on this ground. Pennsylvania courts do not require that the child witness understand the dictionary definition of the oath. Rather, it is sufficient that the child demonstrate an ability to differentiate between truth and falsehood, appreciate the duty to tell the truth, and recognize the inevitability of punishment as a consequence of false statements.[30]

When a child's competency to testify is questioned, the trial judge may conduct a voir dire examination. Pennsylvania courts consistently hold that determination of competency is within the sound discretion of the trial judge[31] and will not be reversed on review in the absence of clear, flagrant abuse.[32] Professors Wigmore and McCormick recommend that such determinations never be disturbed.[33] Both commentators contend that the requirement of establishing competency be abolished and a child of any age be permitted to testify. The trier of fact then would determine the weight and credibility of the testimony aided by cautionary instructions from the trial court.[34]

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practically every sentence structure, and asks questions which show thought. MARLOW, TEXTBOOK OF PEDIATRIC NURSING 434, 534, 607 (1973).

30. *See* Commonwealth v. Penn, 497 Pa. 232, 240-41, 439 A.2d 1154, 1158-59 (1982) *cert. denied*, 456 U.S. 980 (1983) (court permitted 12-year old child to testify despite lack of understanding of the word oath); Commonwealth v. Riley, 458 Pa. 390, 394, 326 A.2d 384, 385-86 (1974) (six-year old witness stated that he would "go to the devil" if he lied); Commonwealth v. Fox, 445 Pa. 76, 81, 282 A.2d 341, 344 (1971) (court permitted eight-year old child to testify after she stated that she would "be in trouble" is she didn't tell the truth); Commonwealth v. Romanoff, 258 Pa. Super. 452, 459, 392 A.2d 881, 884 (1978) (court allowed eight-year old witness to testify after he stated that to tell a lie "would be a sin"); Commonwealth v. Payton, 258 Pa. Super. 140, 143-46, 392 A.2d 723, 724-25, (1978) (court permitted six-year old child to testify after she stated that her mother would punish her if she told a lie); Commonwealth v. Mangello, 250 Pa. Super. 202, 206-08, 378 A.2d 897, 899-900 (1977) (court held competent a six-year old child who knew people who lie "go to jail"); Commonwealth v. Hughlett, 249 Pa. Super. 341, 346, 378 A.2d 326, 328 (1977) (12-year old child testified that she would go to hell if she lied); Commonwealth v. Ault, 228 Pa. Super. 353, 355, 323 A.2d 33, 34 (1974) (court found nine-year old witness competent after he testified that if you lie in court "you go to jail"); Commonwealth v. Allabaugh, 162 Pa. Super. 490, 492-93, 58 A.2d 184, 185-86 (1948) (court permitted five-year old child to testify despite her ignorance of the meaning of oath).

31. Commonwealth v. Fulton, 271 Pa. Super. 430, 432, 465 A.2d 650, 657 (1983); Commonwealth v. Fultz, ___ Pa. Super. ___, ___, 462 A.2d 1340, 1343 (1983); Commonwealth v. Hart, 501 Pa. 174, 177-78, 460 A.2d 745, 747 (1983).

32. Commonwealth v. Penn, 497 Pa. 232, 241, 439 A.2d 1154, 1159 (1982); In Interest of Lawrence J., ___ Pa. Super. ___, ___, 456 A.2d 647, 649 (1983); Commonwealth v. Stoner, 284 Pa. Super. 364, 368, 425 A.2d 1145, 1149 (1981).

33. 6 J. WIGMORE, EVIDENCE § 1821 (Chadbourn rev. 1976); MCCORMICK ON EVIDENCE § 62 (E. Cleary ed. 1984).

34. Professor McCormick maintains that:

> The major reason for disqualification of [insane persons or children] to take the stand is the judges distrust of a jury's ability to assay the words of a small child or of a deranged person. Conceding the jury's deficiencies, the remedy of excluding such a witness, who may be the only person available who knows the facts, seems inept and primitive. Though the tribunal is unskilled and the testimony difficult to weigh, it is better to let the evidence come in for what it is worth,

Once any challenge to the child's competency has been positively resolved, the child must still dispel adult prejudices against validity of children's thoughts. The most trenchant assumption maintains that because the child's perception of the world differs from an adult's, a child is more likely to mesh facts with fantasy.[35] A young child is considered highly suggestible and easily influenced[36] and thus more likely to fabricate.[37]

After all the doubts and questions concerning the child's testimonial competency are quieted, a grim reality remains. The child, who has been sexually victimized, must submit to a second victimization by the judicial system.

III. The Sexually Victimized Child

Once the court accepts the child as a competent witness, the most arduous task still remains. The child witness must give testimony effectively and accurately.[38] To understand how sexual victimization affects a child's credibility, it is essential to understand the crime of sexual abuse.

Sexual victimization of children is not a new problem.[39] It encompasses a range of behaviors between adults and children, ranging from indecent exposure and molestation[40] to incest[41] and rape.[42] Authority figures—such as parents, step parents, paramours, other relatives, or friends—most frequently perpetrate sexual offenses against

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with cautionary instructions.
McCORMICK ON EVIDENCE § 62 (E. Cleary ed. 1984).

35. Cohen & Harnick, *supra* note 22, at 201.

36. Meyers, *Little Witnesses*, 11 STUDENT LAW. 14, 16 (Sept. 1982).

37. *See contra* Melton, *supra* note 23, at 82. The author contends that "children are no more prone to lying than adults."

38. Note, *The Problems of the Child Witness*, 10 WYO. L.J. 214, 219-20 (1956).

39. Until a century ago, the use of children for the sexual gratification of adults was accepted by almost every major civilization. As early as 300 B.C., records indicate that near eastern countries exploited six- and seven-year old girls, employing them as temple prostitutes. In other societies, young girls remained at the temple until they were chosen by a man willing to pay for sexually initiating them. In ancient Egypt, young girls were often sold to become courtesans. Similarly, ancient Greek and Roman soldiers were notorious for their exploitation of young boys. Until recently, the Kiwai of New Guinea sodomized young males during puberty rites. In China, prepubescent girls could be purchased to serve as concubines, and in feudal Japan monks and Samurai sexually used young boys. In Victorian England, white slave trade flourished, and young girls were shipped to the continent regularly. By 1860, young girls were held prisoner in kiddie prostitute houses in the United States. LINEDECKER, *supra* note 8, at 106-07.

40. Molestation encompasses various forms of sexual contact between an adult and a child, short of actual intercourse. It may consist of fondling (caressing the body or genitals), digital penetration of the vagina or anus, genital contact without penetration, or masturbation. Sodomy may include anal or oral intercourse, or intercourse with animals. R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 13 (1979).

41. Incest is defined as sexual intercourse between a child and a related adult. S. O'BRIEN, CHILD ABUSE: A CRYING SHAME 15 (1980).

42. S. MELE-SERNOVITZ, PARENTAL ABUSE OF CHILDREN: THE LAW AS A THERAPEUTIC TOOL FOR FAMILIES (1979) (copies available from the C. Henry Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect, Denver, Colorado).

children.[43] Sexually abused victims are usually female,[44] whose age at the onset of the sexual assault is, on the average three years old.[45]

A. Current Statistics

It is impossible to obtain reliable statistics revealing the extent of the problem, primarily because sexual victimization of children is one of the most easily concealed forms of maltreatment.[46] For example, one child endured a sexual relationship with her stepfather for a period of four years. When the authorities finally discovered his crime, the stepfather confessed and was imprisoned. Upon release six months later, he resumed his sexual practice with the child, then nine years old.[47]

Commentators and experts believe that any estimation of the scope and frequency of the problem is drastically understated.[48] Nevertheless, the American Humane Association estimates that over 55,000 incidents of sexual offenses against children occurred nationwide in 1982.[49] Statistics in Pennsylvania are equally alarming. A 1984 subcommittee report to the Pennsylvania Senate Judiciary Committee determined that the incidence of child sexual abuse in

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43. *Id.*

44. O'BRIEN, *supra* note 41, at 16. In January, 1979, Dr. Carolyn Swift testified before a United States House of Representatives Subcommittee that data on sexually abused boys has been ignored by a primarily male medical community.

45. SUBCOMM. ON CHILDREN'S JUSTICE, JUDICIARY COMM. TO THE PA. SENATE, REPORT ON CHILDREN'S JUSTICE (Comm. Print Sept. 11, 1984) [hereinafter cited as SUBCOMM. REPORT]. This report is based on a series of five statewide hearings conducted during the summer of 1984 by the Judiciary Subcommittee on Children's Justice. The Subcommittee also found the following facts: Every two minutes in the United States a child is sexually abused. Most sexual abuse goes unreported. Only two percent of sexual molestation against preschool children is ever reported; At least one of every five girls and one out of 11 boys in the nation will suffer some form of sexual abuse before age 18; Child sexual exploitation involves from 300,000 to 1.2 million children each year in commercial sexual activities; Child pornography and prostitution enterprises produce annual profits of two to three billion dollars; About 75% of child abusers claim to have been sexually assaulted as children; According to Justice Department, 70% of all prison inmates claim to have been sexually abused as children; More than 75% of child abusers are family members, friends, or neighbors; The average length of an incestuous relationship is three years; Between two to five million American women have suffered incest. Nineteen percent of all American women and nine percent of all men were sexually victimized as children.

46. It has been estimated that 65,000 cases — or as many as 98,000 children — were reported addressing sexual maltreatment of children nationwide in 1982. The National Center on Child Abuse and Neglect notes that both researchers and practitioners perceive this as a gross underestimate. Statistics compiled by THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEPT. OF HEALTH & HUMAN SERVICES, CHILDREN'S BUREAU, WASHINGTON, D.C. (1984) [hereinafter referred to as NCCAN].

47. J. MACDONALD, RAPE OFFENDERS AND THEIR VICTIMS 115 (1971).

48. GEISER, *supra* note 40, at 8-9. *See supra* note 46.

49. Statistics compiled by THE AMERICAN HUMANE ASSOCIATION, DENVER, COLORADO, available as of Sept., 1984, indicate the following:

the State has reached crisis proportions.[50] In 1982, substantiated reports of sexual abuse against Pennsylvania children increased twenty-eight percent.[51] This increase in reports further reflects a thirty-eight percent increase in episodes of indecent assault[52] and a forty-four percent increase in incidents of involuntary deviate sexual intercourse.[53] In 1983, 2,629 instances of sexual child abuse in Pennsylvania represented a thirty-two percent increase from the previous year.[54] Finally, indecent assaults against Pennsylvania children be-

(I) Estimated Number of Sexual Maltreatment Victims in U.S. Reported to Child Protective Services

	Year						
	1976	1977	1978	1979	1980	1981	1982
Total # of victims	7,559	11,617	12,257	27,247	37,366	37,441	56,607
% male victims	15%	14%	13%	14%	16%	16%	17%
% female victims	85%	86%	87%	86%	84%	84%	83%
% male perpetrators	79%	81%	79%	79%	80%	78%	78%
% female perpetrators	21%	19%	21%	21%	20%	22%	22%
Estimates are based on the following:							
# states in data base	27	28	27	25	28	23	20
% of child population of U.S.	27%	36%	43%	42%	43%	47%	40%

(II) Estimated Number of Incest Victims in U.S. Reported to Child Protective Services*

	1979	1980	1981	1982
Total number of victims	29,097	26,295	35,564	47,797
Male victims	3,770	3,144	4,633	6,822
Female victims	25,328	23,153	30,934	40,974
Victims 5 years of age and younger	3,932	3,939	5,848	9,169

*Incest victims are defined as victims of sexual maltreatment where at least one perpetrator was a parent (natural, step, adoptive, foster, or unspecified parent) or other relative (sibling, grandparent, other relative, or unspecified relative).

Estimates are based on the following:

	1979	1980	1981	1982
# of states in data base	27	28	26	24
% of child population of U.S.	50.5%	54.5%	48.5%	42.0%

50. SUBCOMMITTEE REPORT, *supra* note 45, at 1.

51. OFFICE OF CHILDREN, YOUTH AND FAMILIES, PA. DEPT. OF PUBLIC WELFARE, CHILD ABUSE REPORT 4 (1982).

52. *Id.*

53. *Id.*

54. OFFICE OF CHILDREN, YOUTH AND FAMILIES, PA. DEPT. OF PUBLIC WELFARE, CHILD ABUSE REPORT 5 (1983).

tween ages fifteen and seventeen increased one hundred percent.[55]

B. Criminal Prosecution of the Sex Offenders

In Pennsylvania criminal court proceedings the alleged perpetrator is charged under the crimes code for specific statutory offenses.[56] The Commonwealth must prove that the defendant is guilty

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55. *Id.*

56. These statutory offenses are found beginning at 18 PA. CONS. STAT. ANN. § 3101 (Purdon 1983), which contains pertinent definitions:

> Deviate sexual intercourse is defined as sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.
>
> Indecent contact refers to any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person.
>
> In addition to its ordinary meaning, sexual intercourse includes intercourse per os or per anus, with some penetration however slight; emission is not required.

18 PA. CONS. STAT. § 3121 (1982) defines rape as sexual intercourse with another person not one's spouse by forcible compulsion, by threat of forcible compulsion that would prevent resistence by a person of reasonable resolution or against one who is unconscious or so mentally deficient that such person is incapable of consent.

Rape is punishable as a first degree felony. A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age. 18 PA. CONS. STAT. ANN. § 3122 (Purdon 1983). The statutory provisions at 18 PA. CONS. STAT. ANN. §§ 3123, 3124 (Purdon 1983) address deviate sexual intercourse. The involuntary deviate sexual intercourse provision contains much the same language as the provision on rape and is also punishable as a first degree felony. Voluntary deviate sexual intercourse results in a commission of a misdemeanor of the second degree.

18 PA. CONS. STAT. ANN. § 3126 (Purdon 1983), proscribing indecent assault, provides in pertinent part:

> A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:
>
> (1) He does so without the consent of the other person;
>
> (2) He knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;
>
> (3) He knows that the other person is unaware that an indecent contact is being committed;
>
> (4) He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (5) The other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Similarly, a person commits a misdemeanor of the second degree if, for the purpose of arousing or gratifying sexual desires of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm. 18 PA. CONS. STAT. ANN. § 3127 (Purdon 1983).

A charge of incestuous sexual conduct is brought under 18 PA. CONS. STAT. ANN. § 4302 (Purdon 1983), which proscribes marriage, cohabitation, or sexual intercourse with an ancestor or descendant, brother or sister of whole or half blood or an uncle, aunt, niece, nephew of the whole blood.

Additionally, the defendant in a child sex offense proceeding may be charged under 18 PA. CONS. STAT. § 6301 (Purdon 1983) which proscribes conduct that corrupts or tends to corrupt the morals of any minor less than 18 years of age or who aids, abets, entices, or encourages such minor in the commission of any crime.

beyond a reasonable doubt.[57] Since sexual assault against a child typically takes place in seclusion, the child victim[58] is the only witness to the crime.[59] Because of the duration and nature of the sexual contact,[60] prosecutors must often contend with a dearth of physical evidence. Consequently, the child's testimony may afford the only evidence by which to obtain a conviction in some criminal cases.[61]

Often, the already traumatized child retreats into silence. The perpetrator may have extracted a promise of secrecy by using coercion, threats against the child or the child's loved ones, subtle persuasion, or bribes.[62] Such coercion has powerful force: the child victim becomes confused, guilt-ridden, and terrified of losing the affection of people who comprise his entire world. Additionally, the mystique surrounding sex often causes the child to fear that he will not be believed or will be deemed responsible for the sexual incident.[63] The child may not fully comprehend that his tormentor's behavior is deviant. Finally, the child must confront societal myths and assumptions associated with psychosocial development and sex offenses. Some of the most formidable assumptions include the belief that a child's testimony in sex offense cases is inherently suspect,[64] the belief that a child fantasizes about sexual activity, and the belief that a child is particularly curious about sex.[65]

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57. Commonwealth v. Gardner, 282 Pa. 458, 462, ___ A.2d ___ (1925); Commonwealth v. Donough, 377 Pa. 46, 51-52, (1954) ("reasonable doubt is doubt which must fairly arise out of the evidence and restrain a reasonable man from acting in a matter of importance to himself").

58. "Child victim denotes a child who is involved or says he's involved in a sex offense." Libiai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 981 (1969).

59. Meyer, *supra* note 36, at 14.

60. Wench, *The Case Against the Child Sexual Abuser*, 86 CASE & COMMENT 3, 3 (Sept.-Oct. 1981).

61. Interview with official from Dauphin County Deputy District Attorney office, (Sept. 24, 1984); Telephone interview with official from Luzerne County Assistant District Attorney office (Sept. 18, 1984).

62. SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 85-98 (A.W. Burgess ed. 1978). The authors describe an "accessory to sex syndrome" as a trauma in which young victims are coerced into sexual activity with a person because of his authority or age. The victims are incapable of consenting because of their underdeveloped cognitive and personality levels. Emotional reactions result from the coercion as well as from the pressure placed on the child to maintain secrecy. The child feels the burden of this pressure as fear.

63. *Id.*

64. *But see* People v. Thomas, 20 Cal. 3d 457, 466, 573 P.2d 433, 440, 143 Cal. Rptr. 215, 222 (1968) ("improper to assume that the testimony of all children in sex cases is inherently suspect").

One commentator suggest that although children are suggestible to overt and covert influences, they are no more susceptible than adults. Additionally, while children are prone to fantasize, these fantasies are based on their daily experiences. Since knowledge is an essential basis for fantasy, children are unlikely to fantasize about sex. Additionally, children's fantasies involve play situations, and are unlikely to use fantasy as a serious method of communication. If a child's description of events seems fanciful, it is because he lacks the skills to articulate his experiences. Lloyd, *Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW, 103, 105-06 (J. Buckley ed. 1982).

65. *Id.*

C. *The Second Victimization*

When a child is sexually victimized, society is confronted with the unpalatable fact that the safeguards developed to protect the most vulnerable of its members do not always work.[66] Yet despite the attention contemporary society pays to the emerging problem of child abuse, it has refused to and failed to deal with the problem of the child victim as a witness in the criminal prosecution of child sex offenses. The child victim must endure countless interrogations by an array of strangers—social workers, police, law clerks, district attorneys, defense counsel, and judges.[67] The criminal proceedings transpire in an adult courtroom in the presence of people unfamiliar to the child. Within this intimidating setting, the child must attempt to explain confusing events in adult language, while facing the alleged perpetrator. This testimony, which forces the child to publicly reveal the details of the sexual contact, . . . often exacerbates his psychological trauma and guilt.[68]

The news media's startling disclosures of sexual child abuse have generated a phenomenal reaction nationwide. Pennsylvania has responded by introducing legislation designed to protect the child from the second victimization which often occurs in court.

IV. The Remedy — Pennsylvania Senate Bill 1361

A. *Statutory Provisions*

The Pennsylvania Senate Subcommittee on Children's Justice has determined that the Commonwealth's children do not have equal access to justice in a criminal legal system geared toward adults.[69] In order to remedy this inequity, the Subcommittee has recommended the enactment of Senate Bill 1361, popularly known as the Greenleaf Bill.[70] This legislation addresses several of the major obstacles con-

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66. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults* 35 FED. PROBATION Q. 15 (Sept. 1971).

67. *See supra* note 61. *See generally* LEGAL RIGHTS OF CHILDREN (Horowitz & Davidson eds. 1984).

68. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court*, 15 U. MICH. J.L. REF. 131, 132 (Fall, 1981).

69. SUBCOMM. REPORT, *supra* note 45, at 1.

70. S. 1361, 168th SESS. PA. GEN. ASSEMBLY (1984) [hereinafter referred to as S. 1361 or the Greenleaf Bill]. The Bill reads in pertinent part:

> § 6374. Videotaped depositions.
>
> In any prosecution involving a child victims or witness, the court, on its own motion or the motion of the child victim or witness, the child's attorney or the attorney for the Commonwealth, for good cause shown, may order the taking of a videotaped deposition of the victim or witness which shall be used at any preliminary hearing, pretrial proceeding and at the trial in lieu of the testimony of the child. The depositions shall be taken before the court in chambers or in the judge's chambers or in a special facility designed for taking the depositions of children in the presence of the district attorney, the defendant, and the defendant's attorney. At the request of the child, the child's parent or guardian or the

fronting the child victim of a sexual offense when he must also appear as a prosecution witness.[71] The Subcommittee readily accepts the proposition that "in person" testimony at trial is most desirable because of the personal impact upon the jury.[72] The legislation, however, accommodates the needs of vulnerable children whose emotional health may be compromised by the ordeal of testifying in court.

The Greenleaf Bill's provisions include, *inter alia*,[73] use of the child's videotaped deposition[74] in lieu of testimony at trial[75] as well

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district attorney, the court shall exclude all persons not officers of the court, appointed child advocates, family members of the child or the defendant or others deemed by the court to be supportive of them, or otherwise required to attend. The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant. Examination and cross-examination of the child shall proceed in the same manner as permitted at trial.

§ 6375. Testimony of child.

(A) Methods of Taking Testimony.—In any prosecution involving a child victim or witness, where a videotaped deposition has not been taken under section 6374 (relating to videotaped depositions), the child victim or child witness shall testify in open court or the child's testimony shall be taken as provided in subsection (B).

(B) Closed Circuit Television.—The court may, on the motion of the attorney for the child victim or witness, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the Commonwealth, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child, including persons designated under section 6372 (relating to rights and services), may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during the testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant.

(C) Effect of Order.—If the court orders the testimony of a child to be taken under subsection (B), the child may not be required to testify in court at the proceeding for which the testimony was taken.

71. The remaining focus of this comment is limited to discussion of the application of the Greenleaf Bill to the child victim of a sex offense who must appear as a witness for the prosecution. The Bill itself also includes child witnesses or victims within its ambit.

72. SUBCOMM. REPORT, *supra* note 45, at 2.

73. The Greenleaf Bill also includes provisions for the designation of court advocates to work on behalf of children involved in criminal proceedings as witnesses or victims (§ 6372); a statement on the duty of the court and district attorney to ensure a speedy trial (§ 6373); a provision addressing the use of the child's out of court statements describing sexual contact (§ 6376); the use of anatomically correct dolls (§ 6377) and a proscription on the press from revealing the name of the child victim in cases of physical or sexual abuse.

74. S. 1361, *supra* note 73, at § 6374. The current provisions under Pennsylvania law regarding the videotaping of testimony are:

PA. R. CRIM. P. 9015—Preservation of Testimony After Institution of Criminal Proceedings

(a) At any time after the institution of a criminal proceeding, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

as the option to testify via closed circuit television.[76] The child's videotaped deposition may be taken before the court in its chambers, in the judge's chambers, or in a special facility designed for the taking of depositions of children.[77] The district attorney, the defense counsel, and the defendant are present at the taping and the child is examined and cross-examined in the same manner as permitted at trial.[78] Similarly, when the child testifies during a trial via closed circuit television, the child is taken to a room other than the courtroom, and the testimony is relayed via closed circuit equipment into the courtroom to be viewed by the court and the finder of fact. Cameramen are secluded behind screens or mirrors.[79]

While the express intent of the Greenleaf Bill[80] focuses on the

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(b) The court shall state on the record the grounds on which the order is based.

(c) The court's order shall specify the time and place for the taking of the testimony, shall specify the manner in which the testimony shall be recorded and preserved, and shall establish procedures for custody of the recorded testimony.

(d) The testimony shall be taken before the court in the presence of the parties and their attorneys, unless presence is waived.

(e) Nothing in this rule shall preclude the taking and preserving of testimony upon the express written consent of the parties. Such consent shall be filed of record.

Note: Adopted November 8, 1982, effective January 1, 1983.

Comment: This rule is intended to provide the means by which testimony of a potentially unavailable witness may be preserved for use at a subsequent stage in the criminal proceedings.

"May be unavailable," as used in this rule, is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceeding, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason.

The means by which the testimony is recorded and preserved is within the discretion of the court and may include the use of electronic or photographic techniques such as videotape. Ordinarily, when ordering preservation of testimony, the court should consider that the proceeding be, as nearly as possible, adversarial, affording the parties full opportunity to examine and cross-examine the witness.

The procedure for obtaining videotaped depositions in a Civil Procedure in Pennsylvania can be found in PA. R. CIV. P. 4017.1.

75. Depositions serve either of two purposes: depositions to preserve evidence and discovery depositions. Since the focus of this comment concerns criminal proceedings, the term deposition used herein refers only to depositions used to preserve evidence. *See generally*, MCCORMICK ON EVIDENCE § 3 (E. Cleary ed. 1984). "The Crime Control Act of 1970 provides for taking depositions primarily for the preservation of the evidence of the witness (for future use as evidence) and not for the purpose of discovery of facts." *See, e.g.*, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 440 U.S. 984 (1973); People v. Feigleman, 65 Cal. App. 319, 223 P. 579 (1924); FED. R. CRIM. P. 15.

One commentator discusses the psychological harm to a child witness during a discovery deposition. *See* Note, *The New Criminal Deposition Statute in Ohio — Help or Hinderance to Justice*? 19 CASE W. RES. L. REV. 279 (1968).

76. S. 1361, *supra* note 70 at § 6375.

77. *Id.* at § 6374.

78. *Id.*

79. *Id.* at § 6375.

80. *Id.* at § 6371. The provision discussing legislative intent reads as follows:

In order to promote the best interests of the children of this Common-

prevention of additional psychological trauma to child victims or witnesses, prevention of such trauma necessarily leads to an enhanced probative value of the child's testimony.[81] A child that is terrified into silence or near silence cannot be expected to provide the finder of fact with credible evidence. Nevertheless, the Commonwealth's compelling interest in protecting children and its substantial interest in increasing probative value of testimonial evidence must be balanced against the protections that are guaranteed the accused.

Such a balancing process generally occurs within the context of a constitutional challenge on appeal. Accordingly, the validity of the Greenleaf Bill must be assessed in light of its unevitable source of challenge: a sixth amendment right of confrontation claim.

B. Sixth Amendment Challenges — The Right to Confront Witnesses

The Commonwealth of Pennsylvania has a compelling interest in protecting sexually victimized children who appear as witnesses in the prosecution of sexual offenses.[82] The Greenleaf Bill promotes this interest, while safeguarding the fundamental, constitutionally protected rights of the accused. Nevertheless, constitutional challenges to this legislation are likely.[83]

The sixth amendment of the United States Constitution[84] guarantees to the accused, among other things,[85] the right to confront

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wealth, and in recognition of the necessity of affording to children who are witnesses to or victims of crime additional consideration and different treatment than that usually required by adults, the General Assembly declares its intent, in this subchapter, to provide these children with additional rights and protections during their involvement with the criminal justice system. The General Assembly urges the news media to use restraint in revealing the identity of children who are victims of or witnesses to crimes, especially in sensitive cases.

81. *See generally*, Melton, *supra* note 23.

82. Cruz v. Commonwealth Dep't of Public Welfare, ___ Pa. Commw. ___, 472 A.2d 725 (1984). The court stated that the Commonwealth had a paramount interest in uncovering child abuse and protecting past and potential abuse victims. *Id.* at ___, 472 A.2d at 728.

83. *Hearings on S. 1361 Before the Subcomm. on Children's Justice of the Pa. Senate Comm. on Judiciary*, 168th Sess. Pa. Gen. Assembly (July 10, 1984) (statement of Max Levine on behalf of the American Civil Liberties Union). Mr. Levine's statement in pertinent part contends that:

> Our principle concern, however, is with § 6374, the videotaping of depositions. here we are taking away the accused's right to a fair and public trial—one of the basic rights afforded by the Constitution for those accused of a crime (6th Amendment). ACLU has always been a supporter of the right to face one's accuser, in open court, where the eyes and ears of the media and the public serve to prevent the procedure from becoming a "star chamber." The confrontation clause states: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'

84. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. CONST. amend VI.

85. The sixth amendment embraces other rights in addition to the right of confrontation. Of particular importance is the right to an open public trial. Pursuant to the Greenleaf Bill, a child's testimony initially may be taken under conditions of limited public access. How-

witnesses against him. The guarantee is binding on the states through the fourteenth amendment.[86] Likewise, the Pennsylvania Constitution contains a similar provision.[87] Historically, the primary objective of the sixth amendment was to prevent trials by ex parte affidavits and depositions, in lieu of personal testimony and cross-examination.[88] The protection was designed to ensure that the ac-

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ever, this testimony is eventually transmitted electronically to the open court. Under these circumstances, the Greenleaf Bill does not appear violative of the right to an open trial.

However, to rebut such an argument, Pennsylvania has strong precedent upholding the constitutional validity of a similar procedure—removal of spectators during the testimony of sexually victimized witnesses. The Pennsylvania Supreme Court specifically addressed this issue in Commonwealth v. Knight, 469 Pa. 57, 364 A.2d 902 (1976). In that case, a 13-year old boy witnessed the strangulation of the defendant's mother and six- year old stepsister. At the time of trial, the young boy remained emotionally disturbed as a result of the experience. In order to protect the young witness from further emotional distress, the lower court excluded spectators from the courtroom during his testimony. In upholding the exclusionary order, the Pennsylvania Supreme Court found that the defendant was not deprived of his constitutionally protected right to a public trial. Noting that this right was not absolute, the Pennsylvania Supreme Court stated that the right to a public trial must be considered in relation to other important interests, and after an assessment of the circumstances and the necessity of such action, the trial court may issue an exclusionary order designed to effectuate protection of important interests without infringing upon the accused right to a public trial. Furthermore, the supreme court found that the impact upon the rights of the accused is easily controlled by limiting the scope and duration of the exclusionary order. While the trial court cannot exclude the entire public for the entire duration of the trial, it may exclude a specific class for the entire duration. It may also exclude the entire public for a limited period of time, for example, during a child's testimony.

Similarly, in Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A.2d 509 (1975), the Pennsylvania Superior Court sustained the trial court's order to clear the courtroom of spectators during the testimony of a 31-year old rape victim. In finding that the accused's right to a public trial is not without limitations, the Pennsylvania Superior Court acknowledged that the sensibilities of a rape victim forced to publicly relive her experience was a cognizable and appropriate state interest. As in *Knight*, the exclusion of spectators was limited to the duration of the victim's testimony. Clearly, the Commonwealth's interest in protecting young witnesses and victims from further psychological trauma is equally or even more compelling than its interest in protecting adult rape victims.

While these two cases offer strong support for constitutional validity of limited courtroom closure during the testimony of a child, a 1983 Pennsylvania Supreme Court case must be distinguished. In Commonwealth v. Contakos, 492 Pa. 465, 453 A.2d 578 (1982), Justice Flaherty's plurality opinion held that closure of a first-degree murder trial during the testimony of an adult witness violated the state constitution's mandate of an open trial. The court discussed at length the infamous trial of William Penn in 1670 as a basis for its holding. The court maintained that these memories were of crucial importance to Penn as he drafted the Frame of Government indicating that all courts shall be open.

Although interesting from a historical perspective, the *Contakos* court's reasoning is confusing and fails to address the case on its merits. Historical data does not support the conclusion that the public was excluded from Penn's trial. Exclusion of the public for a limited period of time to protect the safety of the testifying witness was the issue before the *Contakos* court. This plurality opinion offers dubious precedential value, particularly when the witness is a child. As Justice McDermott stated in his dissent, "Fortunately, the majority has confined its attention to the facts of this case and has not exalted the mandate into an all-encompassing rubric that suffers no exception. For, indeed, there are exceptions as this court so plainly stated in Commonwealth v. Knight." Commonwealth v. Contakos at 470, 453 A.2d at 583 (McDermott, J., dissenting).

86. Pointer v. Texas, 380 U.S. 400 (1965).

87. "In all criminal prosecutions the accused hath a right . . . to meet the witness face to face." PA. CONST. art. I, § 9.

88. Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); Mattox v. United States, 156 U.S. 237, 242-43 (1895). Some scholars maintain that the confrontation clause originated in

cused had an adequate opportunity to challenge the accuracy of statements made against him and to permit the jury to observe the demeanor of the witness while testifying.[89]

Although the right of confrontation is fundamental,[90] it is not absolute.[91] The right of confrontation may yield to other legitimate concerns in a criminal trial proceeding.[92] Although constitutional protection is beneficial and valuable to the accused, it may give way to overriding public policy considerations or necessities of the case.[93] In *Snyder v. Massachusetts*,[94] Justice Cardozo recognized limitations on the right of confrontation. As he demurred: "nor has the privilege of confrontation at any time been without its exceptions . . . . The exceptions are not even static but may be enlarged from time to time if there is no material departure from the reason of the

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response to the trial of Sir Walter Raleigh in England in 1603. Raleigh was convicted and executed for treason. His conviction was based upon ex parte affidavits. He had no opportunity to call witnesses or cross examine witnesses against him. *See* F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104-06 (1969). *See generally* California v. Green, 399 U.S. 149, 174-79 (1970) (Harlan, J., concurring).

89. *See* Govt. of Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967), where the court noted:

> Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indications which fall from a witness during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words. Even beyond the precise words themselves lies the unexpressed indication of his alignment with one side or the other in the trial. It is indeed rarely that a cross-examiner succeeds in compelling a witness to retract testimony which is harmful to his client, but it is not infrequently that he leads a hostile witness to reveal by his demeanor—his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance—that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness. The demeanor of a witness, as Judge Frank said, is "wordless language."

90. Snyder v. Mass., 291 U.S. at 106-07.

91. Commonwealth v. Stasko, 471 Pa. 373, 379, 370 A.2d 350, 353 (1977); Commonwealth v. McCloud, 457 Pa. 310, 312, 322 A.2d 653, 655 (1974).

92. Mancusi v. Stubbs, 408 U.S. 204 (1972).

93. *See* Mattox v. United States, 156 U.S. at 243-44, where the Court pointed out that:

> A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

Technically, the confrontation clause discussion in *Mattox* was not part of the holding. The defendant offered the dying declaration into evidence. However, the court has treated this dictum as authority for the use of dying declarations against the defendant.

94. Snyder v. Massachusetts, 291 U.S. 97 (1934).

general rule."[95]

In order to determine whether the right of confrontation militates against the use of videotaped depositions or closed circuit testimony in a criminal proceeding, the essential components of that right must be determined. Unfortunately, this is not an area of clearly settled law. Some recent court decisions suggest that the right to cross-examine witnesses comprises the essence of the confrontation clause.[96] Other decisions focus on the relationship between the hearsay rule[97] and the confrontation clause, relying on the evidentiary rule to determine the scope of the constitutional provision."[98] Still other scholars and commentators maintain that the availability of the witness is the essential component of the confrontation clause.[99]

In the seminal case of *California v. Green*,[100] Justice White enunciated three factors underlying the right of confrontation: the administration of the oath to impress upon the witness the solemnity of the testimony; the use of cross-examination as an effective device for determining truth; and the opportunity for the jury to observe the demeanor of the witness to aid its assessment of his credibility.[101]

The Accommodations afforded the child witness under the Greenleaf Bill substantially comply with the three criteria articu-

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95. Snyder v. Mass., 291 U.S. at 107. *See also* Ohio v. Roberts, 448 U.S. 56, 64 (1980); Illinois v. Allen, 397 U.S. 337 (1970); United States v. Carlson, 547 F.2d 1346 (8th Cir., 1976), *cert. denied*, 431 U.S. 914 (1977).

96. Chambers v. Mississippi, 410 U.S. 284 (1973) ("The right of cross-examination is . . . implicit in the constitutional right of confrontation and helps assure the accuracy of the truth determining process."); Dutton v. Evans, 400 U.S. 74, 89 (1970). *See* Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). *But cf.* Barber v. Page, 390 U.S. 719 (1968) (although prior testimony at a preliminary hearing had been subject to cross examination, it was deemed violative of a confrontation right where a good faith effort to obtain the witness for trial was not demonstrated); Mattox v. United States, 156 U.S. 237 (1895) (dying declaration that was not subjected to cross examination deemed admissible).

97. Professor McCormick defines hearsay by employing the definition in the Federal Rules of Evidence: "Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MCCORMICK ON EVIDENCE § 246 (E. Cleary ed. 1984); FED. R. EVID. 801. *See* Mattox v. United States, 156 U.S. 237, 243 (1895). *But see* Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965). In all these cases certain evidence was arguably admissible under a hearsay exception but the court held that its admission into evidence would violate the confrontation clause.

98. *But see* California v. Green, 399 U.S. 149, 155 (1970), where the Court noted:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence.

99. *Id.* at 174 (Harlan, J., concurring) ("Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial.") (emphasis in original).

100. 399 U.S. 149 (1970).

101. *Id.* at 158.

lated by Justice White. Under either the videotaped deposition or the closed circuit television options, the witness would be sworn. In both situations, the defendant and his counsel would be present, and the witness would be subject to full cross-examination. Also, in both situations, the jury would be able to observe the demeanor of the witness under direct as well as cross-examination.[102]

There is precedent in Pennsylvania supporting the use of electronic testimony in criminal proceedings. Pennsylvania Rule of Criminal Procedure 9015[103] provides for the preservation of testimony after the institution of criminal proceedings and the official comment to Rule 9015 contemplates electronic or photographic techniques, such as videotaping, as acceptable means of preserving testimony.[104]

In *Commonwealth v. Stasko*,[105] the Pennsylvania Supreme Court held that the trial court properly allowed into evidence a videotaped deposition of an adult eyewitness to a murder after the trial court concluded that the emotional strain of testifying at trial might aggravate the eyewitness' underlying physical ailment. In upholding the conviction, the *Stasko* court necessarily accepted the premise that the right to confrontation at trial is not absolute, ". . . and endorsed the analysis of *California v. Green*."[106] By substantially complying with the criteria articulated in *California v. Green*, the supreme court explained courts would adequately safeguard the defendant's right of confrontation.[107]

But Pennsylvania authority on this issue is scarce mainly because of the relatively recent emergence of videotaped or closed circuit testimony. Therefore, the manner in which other jurisdictions have addressed constitutional challenges to electronic confrontation warrants examination. In *Kansas City v. McCoy*,[108] the supreme court of Missouri upheld the use of closed circuit television for examining an absent expert witness. The court did not find the procedure violative of the confrontation clause, emphasizing instead the importance of recognizing new methods of communication that allow clear, accurate voice and image projection under sufficient controls to ensure the integrity of the projection.[109] Similarly, in *State v. Melendez*,[110] the Arizona Court of Appeals sustained the use of vide-

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102. S. 1361 *supra* note 73, at §§ 6374, 6375.
103. *See supra* note 77.
104. *Id.*
105. 471 Pa. 373, 370 A.2d 350.
106. *Id.* at 379, 370 A.2d at 353.
107. *Id.*
108. Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975) (en banc).
109. *Id.* at 339.
110. 135 Ariz. 390, 661 P.2d 654 (1982). *See also* People v. Moran, 39 Cal. App. 3d 398, 410, 114 Cal. Rptr. 413, 420 (1974) (videotaped testimony of chief witness for the prose-

otaped testimony of a six-year old sexual assault victim in lieu of actual testimony at trial. The trial court had entered the videotaped testimony into evidence based on a clinical psychologist's testimony that the child was likely to become noncommunicative if called to testify before a jury. Noting that the defendant and his counsel were present at the videotaping and afforded an opportunity to cross-examine the child witness, the court held that the use of the videotape did not deny the defendant's constitutional right of confrontation.[111]

In contrast to this authority, a few recent court decisions[112] maintain that the confrontation clause encompasses the right to physical presence of the accused and his face-to-face confrontation with the witness. Under their analysis, any procedure impeding this face-to-face meeting violates the accused's constitutional rights. Although some of the earlier cases[113] do use the term "face-to-face" as well, the technological context in which these cases (all predating 1935) were decided may distort the significance of this phrase. At the time legal scholars and practitioners could not have conceived of an alternative to the witness' physical presence in the courtroom which would substantially fulfill the underlying purposes of the confrontation clause. Thus, at least in these pretelevision era cases, it is far from conclusive that "face-to-face" meant ensuring ". . . a mere . . ." "physical looking upon" the witness.[114] The more reasonable view would acknowledge that the "face-to-face" requirement merely comported with the only means available at the time, to safeguard

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cution "is sufficiently similar to live testimony to permit the jury to properly perform its function"); Hutchins v. State, 286 So. 2d 244 (Fla. Dist. Ct. App. 1973) (videotaped testimony of expert witness, a laboratory technician, properly admitted into evidence); State v. Hewett, 86 Wash. 2d 487, 490-94, 545 P.2d 1201, 1203-05 (1976) (en banc) (permitting the admission of the videotaped testimony by robbery victim. The court stated that the accused's sixth amendment rights were not violated when the victim who was unavailable for trial had been sworn at the videotaping. In addition, the accused had been present and had had the opportunity to cross-examine the victim. Also, the tape was properly authenticated.).

111. State v. Melendez, 135 Ariz. at 398, 661 P.2d at 656-57.

112. United States v. Benfield, 593 F.2d 815 (8th Cir. 1979); Herbert v. Superior Court, 117 Cal. App. 3d 661, 172 Cal. Rptr. 850 (1981) (at the trial court's direction the defendant was seated so he could hear but not see the five-year old victim of his alleged crime. Court of appeals held that under these circumstances, the defendant's right to confrontation had been abridged).

113. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Kirby v. United States, 174 U.S. 47, 55 (1899); Mattox v. United States, 156 U.S. 237, 243 (1895). *See also* PA. CONST. art. I, § 9 (using the language: "to meet the witness face to face." Any proposed interpretation of the phrase "face to face" applies to its use in the Pennsylvania constitution).

114. As Professor Wigmore explains:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.
>
> That this is the true and essential significance of confrontation is clear.

5 J. WIGMORE, EVIDENCE § 1395 (Chadbourn rev. 1974).

the confrontation rights of the accused.[115]

Recent authority from the Eighth Circuit apparently reaffirming the necessity of face-to-face meeting of accused and witness can be found in *United States v. Benfield*.[116] However, the peculiar facts of that case are readily distinguishable from sexual assault cases involving children. In *Benfield*, the key witness for the prosecution, an adult, testified via videotaped deposition because she claimed to be "psychologically unavailable" for trial, yet the same witness had granted interviews with the news media and held news conferences before the trial. Moreover, the videotaped deposition was taken in her hospital room at a time when she was deceived into believing the defendant was not present. Although the witness was subject to cross examination by counsel, the defendant himself was not physically permitted in the room. Instead, he was allowed to observe the proceedings on a monitor. He was able to halt the proceedings by hitting a buzzer and allowed to confer with his counsel at that point.[117] Arguably, these circumstances did not warrant use of a videotaped deposition in the first place, nor did the procedures adequately safeguard the defendant's rights.

The Greenleaf Bill addresses the compelling state interest of protecting child victims as witnesses. This legislation requires both videotape and closed circuit testimony to be conducted in a properly solemn setting[118] and, more importantly, in the presence of the defendant.[119] The *Benfield* court itself acknowledged that "[when] the procedures more nearly approximate the traditional courtroom setting, our approval might be forthcoming."[120] Significantly, the court recognized that "the alleged involvement of a defendant charged with a crime against persons could be so heinous as to excuse the victim from facing [the defendant] while testifying," although the conduct in this case did not reach such magnitude.[121]

The *Benfield* decision might be completely without significance for the Greenleaf Bill, except for that court's apparent concern that the witness was deceived. Although the Greenleaf Bill does not advocate deceiving the child witness into believing the alleged perpetrator is not present, it does provide that the child be unable to hear or see

115. For example, in Mattox v. United States, 156 U.S. 237, 242-43 (1895), the Supreme Court discussed the protections of the confrontation clause, saying, "the accused has . . . opportunity . . . of compelling [the witness] to stand face to face *with the jury in order that* they may look upon him and judge by his demeanor upon the stand . . . whether he is worthy of belief." *Id.* (emphasis added).

116. 593 F.2d 815 (8th Cir. 1979).

117. *Id.* at 817.

118. *See supra* notes 77-79 and accompanying text.

119. *Id.*

120. United States v. Benfield, 593 F.2d at 821.

121. *Id.*

him.[122] Therefore, to the extent that *Benfield* may stand for the proposition that such a requirement is constitutionally infirm, the decision must be addressed.

The *Benfield* court never articulated its precise concern with the witness' false perception that the defendant was not present. It did state, however, that "most [persons] believe that in some undefined but real way, recollection, veracity, and communication are influenced by face-to-face challenge."[123] Reasoning that face-to-face confrontation is essential because it increases the likelihood that an untruthful witness will succumb, the court, however, failed to produce empirical data to support this contention.

In fact, there is evidence that such testimony is *less* reliable, especially when the witness is a child victim of a sexual offense.[124] If the objective in mandating face-to-face confrontation of the accused and the witness is to force the emotionally or psychologically immature witness to succumb to the presence of the defendant, then the proponents of such a requirement will have transformed the sixth amendment guarantee of right of confrontation into a right to intimidate the witness.

Such a transformation is improper, as various courts have ruled. These decisions resoundingly uphold the tenet that the right of confrontation is not congruent with a right of intimidation. In *United States v. Carlson*,[125] the Eighth Circuit, sitting en banc, found that a defendant's intimidation of a witness resulted in the witness' refusal to testify at trial. Under those circumstances the court found no violation of the sixth amendment confrontation right when later the absent witness' grand jury testimony was admitted at trial. The court simply refused to sanction the practice of intimidating witnesses to prevent their testimony at trial by allowing the accused to derive any benefit from such conduct.[126] The court reached this conclusion though the defendant's counsel never had an opportunity to cross-examine the witness.[127]

Other courts have affirmed this proposition. In *Burkett v. State*,[128] for example, the Criminal Court of Appeals of Alabama upheld the conviction of physical abuse despite a sixth amendment

122. S. 1361 *supra* note 70, at §§ 6374, 6375.

123. United States v. Benfield, 593 F.2d at 521.

124. Face-to-face confrontation with extremely vulnerable victims, such as children, may diminish the reliability of their testimony rather than enhance it. One commentator has observed: "The well-established 'inverted-U relationship' between arousal and performance suggests that placing witnesses in great emotional distress would result in testimony of less probative value." *See* Melton, *supra* note 23, at 75.

125. 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

126. *Id.* at 1359.

127. *Id.*

128. 439 So. 2d 737 (Ala. Crim. App. 1983).

challenge by the appellant that he was denied the opportunity to confront the six-year old victim "face-to-face". The appellate court approved of the trial court's positioning of the defendant during examination of the witness, stating:

> [t]he record is clear that the appellant's proximity to the witness caused her discomfort . . . . The possibility of the appellant intimidating the victim was present . . . . In order to ensure that the witness' testimony be understandable and of some worth to the State . . . the trial court properly treated the examination of the victim with delicacy.[129]

It seems clear that the constitutionally protected right of confrontation does not include a right to intimidate. Either testimonial scheme provided for in the Greenleaf Bill substantially comports with the underlying purposes of the sixth amendment guaranty. Arguably one predominant reason exists for the accused to demand such a narrow and absolute face-to-face confrontation with the child. The accused hopes to capitalize on the inherent weaknesses of childhood and he relies on his presence and the system to intimidate the child witness into silence or anxiety-produced confusion. Such a concern does not rise to the level of a constitutionally protected right. If there is any prejudice at all to the accused, it is incidental. The increased reliability and probative value of the child's testimony weighs any incidental prejudice to the accused.

Finally, it must be recognized that most courts allow special testimonial procedures only upon a showing of witness unavailability.[130] This concept has been interpreted to mean that the witness cannot be unavailable as a result of the prosecution's conduct and that the prosecution has made a good faith attempt to obtain the witnesses' presence at trial.[131] Recognizing unavailability as a key component of the confrontation clause will not present insurmountable constitutional problems for the Greenleaf Bill. Without specifically articulating a requirement of unavailability, but permitting alternatives to protect the child's emotional well-being,[132] the Subcommittee eluded to a category of psychological unavailability. Such a category based on the compelling state interest to protect its children's psychological health would not violate the confrontation clause.

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129. *Id.* at 747.

130. Mancusi v. Stubbs, 408 U.S. 204 (1974); California v. Green, 399 U.S. 149 (1970).

131. Barber v. Page, 390 U.S. 719 (1968).

132. *See* SUBCOMM. REPORT, *supra* note 45.

V. Unanswered Questions — Problems and Proposals

A. Proposed Improvements

The Greenleaf Bill is a commendable first step toward addressing the disparate treatment of sexually victimized children in the Pennsylvania legal system. Nevertheless, both stylistic and substantive flaws exist in the Bill. Initially, the drafters must define the terms used in the Bill more precisely. Foremost, the Bill needs a definition of "child" to set the parameters of its applicability. While younger children should be included in the full ambit of the Bill, it is not clear that all persons under eighteen years warrant the maximum degree of protection. Being cognizant that line drawing can be difficult and even dangerous, drafters should, nevertheless, tailor the statute more carefully to its ability to meet constitutional muster.

The Bill's section on procedures also needs to be refined. Currently it provides for the physical presence of the defendant and his counsel at videotapings or during closed circuit testimony.[133] The Bill also requires the court to ensure that the child witness cannot see or hear the defendant.[134] The logistics necessary to achieve both requirements may be difficult to conceptualize. Therefore, the alternatives available to the courts should be clearly set forth in the Bill.[135] Moreover, this meticulous drafting would facilitate the courts' compliance with the legislative mandate in a consistent, effective manner, avoiding ad hoc methods that may be constitutionally problematic.[136]

The most significant weakness of the Greenleaf Bill concerns its failure to address specifically the court's requirement that a witness be unavailable before videotaped testimony can be admitted into evidence.[137] The section of the Greenleaf Bill providing for videotaped

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133. *See supra* notes 77-79 and accompanying text.

134. *Id.*

135. During a telephone interview with Paula Fogarty, Senator Greenleaf's legislative assistant, indicated that the Subcommittee intended to permit the use of screens or one-way mirrors. Telephone interview with Paula Fogarty, Legislative Asst. to Sen. Greenleaf (Oct. 26, 1984). However, use of screens may raise serious constitutional questions if the defendant cannot observe the testifying witness.

136. Additionally, once specific procedures are identified, funds should be provided to ensure the courts' ability to conduct the proceedings according to enunciated alternatives. The purchase of specialized equipment and even structural remodeling of courthouses may be necessary.

137. The current Pennsylvania unavailability requirement governing admissibility of evidence from a former trial is codified at 42 PA. CONS. STAT. ANN. § 5917 (Purdon 1982) and states:

> Notes of evidence at former trial.
>
> Whenever any person has been examined as a witness, either for the Commonwealth or for the defense, in any criminal proceeding conducted in or before a court or record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards dies, or is out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he

depositions merely enunciates a "good cause shown" requirement,[138] and the closed circuit television provision does not articulate any prerequisites to its use at trial.[139] Although the legislative history indicates the drafters' preference for in-person testimony "whenever possible,"[140] that phrase, as well as "good cause shown," must be more clearly pinned down. Incorporating language that establishes potential psychological trauma or exacerbation of existing emotional disturbances as legally sufficient bases for unavailability without diminishing the effectiveness of the Bill.

B. Other Statutory Provisions

Despite this comment's focus on the electronic testimony provisions, other sections of the Greenleaf Bill are equally significant.

1. The Child Advocate.—The Greenleaf Bill provides for designation of a qualified person to act as an advocate on behalf of a child involved in a criminal proceeding.[141] The use of child advocates will be meaningful if they are carefully selected, well trained, and accorded respect by the members of the bar.

2. Out-of-Court Statements.—The provision allowing greater latitude to admit a child's out-of-court statements describing sexual contact is another essential component of the Bill.[142] This section will almost certainly be challenged on sixth amendment right of confrontation grounds. Although the scope of the confrontation clause and the hearsay rule are not congruent,[143] they protect similar inter-

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cannot be found, or if he becomes incompetent to testify for any legally sufficient reason properly proven, notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue. For the purpose of contradicting a witness the testimony given by him in another or in a former proceeding may be orally proved.

138. S. 1361 *supra* note 70, at § 6374.

139. *Id.* at § 6375.

140. SUBCOMM. REPORT, *supra* note 45, at 2. The trial court would determine whether electronic testimony should be used at trial without having to take expert testimony on the need for such procedures. A similar approach is taken by the state of Florida. *See* Washington v. State of Florida, No. AT-430, slip op. (Fla. Dist. Ct. App. May 23, 1984) (available Sept. 11, 1984, on LEXIS, State library, Fla. file).

Additionally, the court may consider other purposes for videotaping the child's testimony. For example, some child abuse experts feel that a videotaped deposition by the young victim may enhance the possibilities of obtaining confessions. Videotaping also helps preserve testimony. This factor may be particularly important in child sexual abuse cases because during the interval between the crime and the trial, the child and her parents may try to forget the experience. Interview with official from Dauphin County Deputy District Attorney (Sept. 24, 1984); Telephone Interview with official from Luzerne County Asst. District Attorney (Sept. 18, 1984); Interview with official from Cumberland County Children and Youth Services (Sept. 10, 1984).

141. S. 1361 *supra* note 70, at § 6372.

142. *Id.* at § 6376.

143. *See supra* note 98.

ests and in many cases tend to bolster each other. However, in view of the increasingly liberal hearsay exceptions in child abuse cases[144] and of the Bill's overall potential to withstand a confrontation clause challenge, arguments opposing this provision on these grounds are likely to fail.

C. *Future Concerns*

1. First Amendment Challenges.—Inevitably, the Greenleaf Bill will evoke strong reservations that it infringes on the public's right of access to trials. But since the Bill does not mandate automatic closure or the use of electronic testimony in *all* cases[145] only by case-by-case determination, the Greenleaf Bill is not likely to be found constitutionally infirm under a first amendment challenge.[146]

2. Educational Programs.—Because background of judges, attorneys, and police rarely includes child psychology and development courses, much less the study of human behavior which perpetuates child abuse, educational programs should be established on their behalf. Additionally, judges should be persuaded to give effect to Pennsylvania's presumption of competency. Numerous witnesses before the Senate Subcommittee hearing the Greenleaf Bill complained that Pennsylvania trial judges rule younger children incompetent to testify almost automatically.[147] The better view, and one certainly in synchronization with the Pennsylvania statute[148] and the federal rules on which the Pennsylvania statute is based,[149] abolishes arbitrary competency requirements based on age. Obviously legislation like the Greenleaf Bill can do little to resolve problems of child witnesses if judges effectively foreclose children from testifying based solely on age.

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144. *See* Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983); Note, *Sexual Abuse of Children—Washington's New Hearsay Exception*, 58 WASH. L. REV. 813 (1982-1983).

145. *See supra* notes 144-46 and accompanying text.

146. Although not perfectly analogous, the constitutional challenges that arise when the trial judge removes spectators during the child's "in person" courtroom testimony are similar. *See supra* note 88.

A recent United States Supreme Court case addresses these concerns. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the appellant press organization was denied access to a rape trial during the testimony of three teenage victims pursuant to a Massachusetts statute that required closure of sex offense trials during the testimony of minor victims. Although the Court held that the mandatory nature of the statute rendered it constitutionally infirm under the first amendment, it also indicated that "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim."

The Greenleaf Bill provides the trial court an option of using electronic testimony, should it determine that a minor victim or witness in that case would sustain psychological trauma if compelled to testify in person at trial.

147. SUBCOMM. REPORT, *supra* note 45, at 4.

148. *See supra* note 15.

149. FED. R. EVID. 601.

3. Victims Under Three Years.—Even if age requirements are abolished, very young children, typically those under the age of three, will have difficulty relating their experiences, and some may not be able to verbalize at all.[150] This problem remains completely unaddressed by the Greenleaf Bill. Tragically, the continued failure to deal with this problem will result in the "perfect crime"—when a perpetrator chooses a victim too small to resist and too young to understand and communicate the details of the experience at trial.

One possible remedy is the use of expert testimony and play therapy. In play therapy children are given choices of "anatomically correct" male and female dolls.[151] The way in which the child utilizes the dolls reveals to the expert whether or not sexual abuse is likely to have occurred. Although defense counsel is likely to object to such testimony as hearsay, it can be argued that such behavior during play therapy does not constitute an assertion.[152] The other means of overcoming the inadequacies of infant witnesses is through the testimony of expert witnesses on sexual abuse syndrome.[153] Although a child may not yet be able to talk, he may exhibit certain nonverbal behavior associated with children who are sexually abused. These alternatives to a child's direct testimony should be seriously considered.

4. The Crimes Code.—The sections of the crimes code dealing with sexual offenses[154] must be revised. Penalties for certain crimes must be upgraded[155] and the possibility of new crime classifications scrupulously evaluated.[156] Furthermore, mandatory sentencing for the convicted perpetrator deserves serious consideration. As the Senate Subcommittee noted, initial reports indicated the efficacy of

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150. *See supra* notes 21-29 and accompanying text.

151. *See infra* notes 158-59.

152. In Re Cheryl H, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984) (child's conduct during play therapy was nonassertive and therefore not hearsay). *But see* State v. Mueller, 344 N.W.2d 262 (Iowa Ct. App. 1983) (testimony acted out with dolls contained hearsay characteristics and was inadmissible). *See generally* State of Arizona v. Cousin, 136 Ariz. App. 83, 664 P.2d 233 (1983); State v. Tuffree, 35 Wash. App. 243, 666 P.2d 912 (1983).

153. State v. Danielski, 350 N.W.2d 395 (Minn. App. 1984) (Expert testimony regarding typical familial sexual abuse symptoms and behaviors inadmissible). *But see* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1982) (testimony on sexual abuse syndrome held admissible).

154. *See supra* note 56.

155. For example, if a perpetrator was convicted for ramming a soft drink bottle into a young child's vagina, he would be guilty only of a second degree misdemeanor. *See* 18 PA. CONS. STAT. ANN. § 1326 (Purdon 1983). But such an experience is as traumatic to the child and as reprehensible to society as penile penetration and warrants penalties comparable to those for first degree felonies like rape and deviate sexual intercourse.

156. A viable alternative would be the creation of two categories of indecent assault — simple and aggravated. Aggravated indecent assault would include penetration by objects into the vagina or rectum and would be classified as a first degree felony. Telephone interview with Jayne Duncan, Dauphin County Deputy District Attorney (Oct. 26, 1984).

mandatory jail time as a deterrent to crime.[157] Additionally, parents may be more willing to subject their children to the grueling ordeal of criminal prosecution of a sex offender if they believe the resulting penal sanctions to be more than a slap on the wrist.

In conjunction with mandatory sentencing, compulsory therapy should be contemplated for the offender. Recidivism rates among child sex offenders remains high.[158] Often the offender was, himself, abused as a child.[159] Certainly, the Commonwealth's interest in protecting its children is promoted by compulsory therapy if when the convict completes his sentence he does not return to the community and commit the same crime again.

5. Conflicting Policies: Prosecution Versus Family Reunification.—Commonwealth agencies that provide children's services need a definitive ordering of the conflicting priorities of family reunification or protection of the child by removal from the home in incest cases. As the Senate Subcommitee observed, "the philosophies of the many agencies dealing with intrafamilial sex abuse may be lagging the new public attitudes by placing too rigid an emphasis on family reunification at the expense of the victim's protection and best interest."[160]

6. An Active Response.—Finally, more emphasis must be placed on the prevention of sexual child abuse. Parents and teachers must be educated to the signs and symptoms of abuse. They must become aware of the importance of listening carefully to the details of their child's or student's conversations. Parents need to create an environment where the child feels that his experiences involving sexual matters can be discussed freely. Additionally, more programs are needed to teach the child to distinguish appropriate from inappropriate physical contact. With educational programs aimed at prevention of sexual child abuse, perhaps the need for the testimony of children in criminal prosecutions of sex offenders will diminish.

VI. Conclusion

Children are the most defenseless members of our society. Startling statistics reveal that sexual abuse of children has reached crisis proportions, permeating even the most revered societal institutions.

157. SUBCOMM. REPORT, *supra* note 45, at 4.

158. *See generally* K. MEISELMAN, INCEST (1978). *See also* LINDECKER *supra* note 8.

159. *Id.*

160. SUBCOMM. REPORT, *supra* note 45, at 3. S. 1361 was unanimously passed by the Senate and House last term. However, Governor Thornburgh vetoed the Bill on Dec. 26, 1984 (due to an attached rider). A substantially similar version was introduced in the Senate this term. Currently designated S. 176 — the Bill was passed by the Senate on Feb. 6, 1985 and sent to the House Judiciary Committee on Feb. 12, 1985.

Despite the reprehensible nature of the crime, society has failed to take effective measures to apprehend, successfully prosecute, and rehabilitate the offender. Instead, in order to present her testimony to the jury, the young victim of a sex offense must endure a rigorous ordeal that exacerbates the inherent frailties of childhood. But the interests of justice are not served when the child is, in a sense, further victimized by a complex prosecutorial system which does not permit her full participation.

Pennsylvania has taken a commendable, initial step toward addressing the special needs of its children in the judicial system. The Greenleaf Bill attempts to protect the child's right to be heard without infringing on the rights of the accused. However, this single piece of legislation is no panacea to the horrifying problem of sexual abuse of children. Additional legislative measures, written in clear, strong, unequivocal language, must follow Senate Bill 1361 to ensure that all the Commonwealth's children have equal access to justice.

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